In the
Supreme Court of the United States

OCTOBER TERM, 1975

NO. 76-89

UNITED STATES OF AMERICA,
Respondent

versus

MICHEL JOSEPH NAPOLI,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO. _____

UNITED STATES OF AMERICA,
Respondent

VERSUS

MICHEL JOSEPH NAPOLI,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petition of Michel Joseph Napoli respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 29, 1976, affirming petitioner's conviction.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 530 F.2d 1198 (5th Cir. 1976) and is appended hereto at page 1A. No opinion was issued on the denial of rehearing and rehearing en banc, June 24, 1976. The United States District Court for the Eastern District of Louisiana issued an unreported Memorandum of Reasons on the denial of petitioner's motion to suppress evidence; the Memorandum is appended hereto at page 5A.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit is dated and was entered April 29, 1976. A timely petition for rehearing and rehearing en banc was denied on June 24, 1976. This Petition for Certiorari was filed within thirty days of that date. Rule 22(2), Revised Rules. Jurisdiction of this Court is

invoked under the authority of 28 U.S.C. §1254(1).

THE QUESTIONS PRESENTED

I. What is the Proper Fourth Amendment (or, Alternatively, Federal) Standard to be Applied to a Search Warrant Application in Which the Police Office Affiant Knowingly Misrepresents the Facts to the Federal Magistrate?

II. Whether Historical Information (Beyond That Required for Normal Booking), Elicited on the Occasion of an Illegal State Arrest for Federal Drug Enforcement Administration Comprehensive Files, May be Carved Out from the Sanction of the Exclusionary Rule Under Davis v Mississippi, 394 U.S. 721 (1969)?

III. Whether Otherwise Potentially Available Independent Documentary Sources, Used Merely to Double-check Information Obtained on the Occasion of an Illegal Arrest, Can Purge The Taint of the Primary, Illegally Obtained, Information?

IV. Whether a Federal Search Warrant Limited by a

United States Magistrate to Authorize Only the Search of a House, May be Loosely Construed Under a Variation of the United States v Ventresca, 380 U.S. 102 (1965) Rule so as to Legitimize a Search of the Entire Curtilage and of a Police-secured Mobile Home Thereon?

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On a stipulated record at a judge trial, subject to the previously denied motion to suppress evidence, petitioner Michel Joseph Napoli was convicted in the Eastern District of Louisiana of conspiracy to distribute, possession

with the intent to distribute, and use of the mails to facilitate distribution of,lysergic acid diethylamide (LSD). The trial court sentenced petitioner under 18 U.S.C. §5010(b) of the Federal Youth Corrections Act. The issues presented by this Petition all arise under the Fourth Amendment and under this Court's supervisory power over federal searches and seizures.

In general outline, the arrest of petitioner resulted from the following federal Drug Enforcement Administration (hereinafter "DEA") actions. DEA undercover agent Riley had met petitioner's co-defendant White. Riley was able to get White to sell him LSD on several occasions, but was never able to discover White's source. The most that Riley could determine was that White's source received the LSD through the mail, and that the source had a shop. On one occasion, White was followed to a shop with utilities registered in the name of petitioner, although petitioner was never seen to communicate with

White.

On April 22, 1974, White agreed to furnish Riley with a large quantity of LSD within the next few days. On April 24, 1974, White advised Riley that negotiations were successful, that a large quantity of LSD would be sent through the mail for distribution to other customers as well, and that White would call Riley when the drugs had arrived. White, however, contacted Riley again and said that the deal was off.*

Meanwhile, the DEA supervisor, Agent Harold Patin, had set up a post office surveillance for suspect packages. On April 26, 1974, postal authorities notified Patin that a package, addressed to a "Michael Joseph, 3027 Napoleon Avenue, New Orleans, Louisiana" had arrived in New Orleans. The return address was determined to be non-existent.

From a 1973 arrest, the DEA agents had interrogated petitioner to determine his relatives, including the fact that his mother lived

*T. 147-149

at 3027 Napoleon Avenue. The 1973 arrest resulted in a state prosecution, in which the evidence was suppressed because of the Fourth Amendment illegality of the arrest and drug seizures. Agent Patin applied to a United States magistrate for a warrant, describing the 1973 arrest information connecting petitioner to 3027 Napoleon Avenue, but failing to advise the magistrate of the state suppression. The validity of the state suppression was never contested by the government at the federal hearing on the motion to suppress. In the application, Agent Patin swore that the address information was "recorded in our files by documents completed at the time of NAPOLI's arrest, above, and in the New Orleans telephone & city directories." At the federal hearing, Patin testified that his use of the telephone directory was limited to the following: "I think I double-checked in [the] telephone books and city directories which are in my office, but not really part of our files."

T. 48-49.

In addition to the arrest information, and other hearsay information which was not adequately described in Spinelli v United States, 343 U.S. 410 (1969) terms, Agent Patin presented to the magistrate information concerning the course of dealing between White and DEA Agent Riley. However, Patin -- although apprised of the facts -- intentionally left out the information that before the package had arrived, White had told Riley that the deal was off. The magistrate issued his warrant to search the package, LSD was discovered, a small sample retained by the agents, and the package re-wrapped.

On the same day -- April 26, 1974 -- the DEA agents arranged for a controlled delivery of the package to 3027 Napoleon Avenue. Agent Raymond Egan was stationed at the offices of the United States magistrate, with radio contact to agents surveilling the scene at 3027

Napoleon Avenue. When the package was delivered, petitioner and his girl friend were observed to remove it from the mailbox on the porch at 3027 Napoleon Avenue, leave the porch, and walk down the driveway towards the rear of the residence. Egan was advised of these actions, filled in the blanks in a previously prepared search warrant application, and presented same to the magistrate. The magistrate authorized the search of "3027 Napoleon Avenue, New Orleans, Louisiana, being a large, multiple-story, wooden-frame residential dwelling." Egan then advised the agents on the scene that the warrant had been signed.

A large group of armed agents descended on Napoli and friend at the rear of the residence. They arrested them, and seized petitioner's keys, which included a key to a padlock on a camper bus -- outfitted as a mobile home -- parked on the driveway. Blocking egress from the driveway was another automobile. From the point of arrest on, both petitioner and his girl friend were

maintained in custody, and had no access to the camper bus. Furthermore, the bus was guarded at all times by armed federal agents.

After a futile search of the rear area and the house, by a process of elimination, the agents decided that the LSD in the package had to have been secreted in the camper bus. Without advising or attempting to contact the magistrate or Agent Egan of the changed circumstances, the agents proceeded to tear apart the camper bus. In a hidden compartment in the bus, agents discovered the contents of the package.

REASONS FOR GRANTING THE WRIT

I. With Seven Out of Ten Circuits Having Confronted the Problem of Misrepresentative Warrant Applications, There Is an Irreconcilable Difference Among the Circuits in the Proper Standards to be Applied; the Issue Is Therefore Ripe for Decision by This Court, and This Case Fully and Fairly Presents the Issue on a Developed Factual Record.

A. Beyond the intimation of standards in Rugendorf v United States, 376 U.S. 528, 533

(1964)*, this Court has not dealt with the multiple problems presented by affiant misrepresentations in search warrant applications. Since 1973, however, the courts of appeal have faced increasing litigation founded on allegations of misrepresentations. The conflicting standards thus developed, and the importance of the issues to the integrity of federal officers and courts in the Fourth Amendment warrant process, demand attention by the Court.

The First, Second, Third, Fifth, Sixth, Seventh, Eighth and Ninth Circuits have been confronted with allegations of misrepresentative

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* "Petitioner's only challenges to the veracity of the affidavit are the two inaccurate facts mentioned above. Since the erroneous statements that petitioner was the manager of Rugendorf Brothers Meat Market and was associated with Leo in the meat business were not those of the affiant, they fail to show that the affiant was in bad faith or that he made any misrepresentations to the Commissioner in securing the warrant."

warrant applications, and the possible standards under which to evaluate such applications. United States v Belculfine, 508 F.2d 58 (1st Cir. 1974); United States v Gonzalez, 488 F.2d 833 (2nd Cir. 1973), and United States v Pond, 523 F.2d 210 (2nd Cir. 1975), cert. den.__U.S.___, 96 S.Ct. 794; United States v Armocida, 515 F.2d 29 (3rd Cir. 1975), cert. den.____U.S.___; United States v Thomas, 489 F.2d 664 (5th Cir. 1973), cert. den.__ U.S.___, 46 L. Ed. 2d 64;United States v Luna, 525 F.2d 4 (6th Cir. 1975), cert. den.____ U.S.__ , 96 S.Ct. 1459; United States v Carmichael, 489 F.2d 983 (7th Cir. 1973) (en banc); United States v Marihart, 492 F.2d 897 (8th Cir. 1974), cert. den. 419 U.S. 827; and United States v Damitz, 495 F.2d 50 (9th Cir. 1974). Drawing on the various permutations in misrepresentative warrant application situations developed in KIPPERMAN, INACCURATE SEARCH WARRANT AFFIDAVITS AS A GROUND FOR SUPPRESSING EVIDENCE, 84 Harv. L. Rev. 825 (1971) -- material or immaterial

misrepresentations, innocently, negligently, or intentionally made -- the circuits have devised varying standards to evaluate misrepresentative applications.

First. All circuits agree that proof of intentional misrepresentations by the affiant requires that the warrant be invalidated. The circuits significantly differ, however, on what they mean by "intentional."

The Fifth Circuit requires the existence of "an intent to deceive the magistrate, whether or not the error is material to the showing of probable cause." United States v Thomas, 489 F.2d at 669. In that case, the defense proved that the misrepresentations by the affiant were knowingly made. These misrepresentations entailed assertions by the affiant that his investigative theories (which turned out to be counterfactual) were facts attributable to the personal knowledge of his informants. The court found that the affiant reasonably believed his theories,

was thereby acting in "good faith," and therefore did not "intend to deceive the magistrate." The Fifth Circuit rule, therefore, requires not only that the affiant make false statements with knowledge that they are false, but additionally, intend to deceive the magistrate into believing a state of facts which the affiant did not believe to be true. The Sixth Circuit appears to have adopted this standard in United States v Luna, 525 F.2d at 8, requiring the "knowing use of a false statement by the affiant with the intent to deceive the court."

The Seventh Circuit would require only "an intentional misrepresentation by the government agent, whether or not material," without the further requirement that the defense prove an intent to deceive the magistrate. United States v Carmichael, 489 F.2d at 988. The Eighth Circuit in United States v Marihart, supra, has adopted the Carmichael standard, as apparently has the Second Circuit in United States v Pond, 523 F.2d

at 213, since that court requires that the misrepresentation merely be "knowing (and therefore intentional)" in order to require suppression.

The First Circuit, in accord with Carmichael, appears to require only that the affiant be shown to have knowingly lied, but requires some showing that the lie was nontrivial. The statement need not be material "in the sense of not being a 'but for essential' of probable cause," but if it changes "a marginally adequate affidavit into a solidly persuasive one," the evidence should be suppressed. United States v Belculfine, 508 F.2d at 62.

> Were the judicial response to be merely the elimination of the false statements and the assessment of the affidavit's adequacy in the light of the remaining averments, enforcement officers would be placed in the untoward position of having everything to gain and nothing to lose in strengthening an otherwise marginal affidavit by letting their intense dedication to duty blur the distinction between fact and fantasy. We therefore see no supportable alternative to suppression of evidence obtained pursuant to a warrant based on an affidavit containing an intentional, relevant, and nontrivial misstatement.

> We see no basis for confining the sanction to false statements made with the specific intent to deceive the magistrate as opposed to false statements merely intended to "round out the picture."
>
> Id.

Second. All circuits agree that some non-intentional misrepresentations, if they are material (in the extreme sense that their excision would leave no probable cause), require the invalidation of the warrant. The circuits disagree as to whether negligent and material misstatements, which are not also "recklessly" made, require suppression, and also, on what non-intentional means.

The Second Circuit, in United States v Gonzalez, supra, was faced with an affiant's sworn statement that at the time of the defendant's arrest, he seized a safe deposit key for a lock box at a particular bank. In fact, at the time of the arrest, the agent was not certain that the key was a safety deposit key at all, investigated to see if the defendant had a safety deposit

box in a nearby bank, but after learning that he did, did not determine whether or not the key fit the box (it did not). Although the affiant knew his representation to be false at the time he swore out the application, the court characterized the misrepresentation as negligent, and non-intentional. Yet, the Second Circuit, in the later case of United States v Pond, supra, reads Gonzalez as defining intentional as merely a knowing misrepresentation.

With regard to the degree of negligence required for suppression, the Seventh Circuit has stated "that evidence should not be suppressed unless the officer was at least reckless in his misrepresentation." United States v Carmichael, 489 F.2d at 989. The Fifth Circuit, on the other hand, would suppress a material misrepresentation which is "non-intentional [in the sense of no "intent to deceive the magistrate"], but the erroneous statement is material to the establishment of probable cause for the search." United States

v Thomas, 489 F.2d at 669. In terms, the Eighth Circuit has rejected the Fifth Circuit standard of Thomas, and adopted the Seventh Circuit standard of Carmichael, United States v Marihart, 492 F.2d at 899-900, as has the Sixth Circuit in United States v Luna, 525 F.2d at 8-9. Recognizing the difference in the two standards, the First, Second and Third Circuits have declined to choose between them, since the facts in the cases confronting them did not require a choice. United States v Belculfine, 508 F.2d at 60-62; United States v Gonzalez, 488 F.2d at 837-838; United States v Armocida, 515 F.2d at 41.

Aside from the KIPPERMAN factors described above, a search warrant application may be as intentionally misrepresentative and misleading where the affiant omits a material or important fact known to him, as where he misrepresents affirmatively. In the only circuit decision to touch the issue, United States v Armocida, supra, the Third Circuit has held that the same standards

(whatever they are) are to be applied to misrepresentations by omission and by commission.

The concept of the "materiality" of misrepresentations (by commission or omission) is not a stranger to the law. Indeed, in the securities context, this Court and numerous lower courts have fleshed out and passed on the standards to be applied.

Rule 10b-5 of the Securities and Exchange Commission, 17 CFR §240.10b-5, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

In Affiliated Ute Citizens v United States, 406 U.S. 128, 153-154 (1972), the Court held the standard of materiality to be as follows:

> Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of his decision.
>
> (emphasis supplied)

Not or of the courts of appeal have drawn from this body of law. The First Circuit standard of United States v Belculfine, supra, approaches the securities standard of materiality. The Fifth Circuit measure of excision in United States v Thomas, supra, diverges from it to the extreme, being the equivalent of "every reasonable investor would have considered the omission crucial so that, with knowledge of the truth, he would necessarily have acted differently." Certainly, the protection of investors under the securities laws, Affiliated Citizens of Ute v

United States, supra, at 151, is not a lesser objective than implementation of the organic law expressed in the Fourth Amendment. And any standard of materiality applied in the Fourth Amendment context should be at least as strong -- i.e., "that a reasonable magistrate might have considered the omission or misrepresentation important in the making of his decision."

B. The case at bar presents a warrant application, alleged by petitioner to be misrepresentative by omission. The issue was fully briefed and argued in the district court and in the Court of Appeals.*

The warrant application in question is a painfully detailed, 49-sentence document, designed by an experienced DEA agent holding a supervisory capacity. Undercover Agent Riley had purchased LSD from Gary White on several

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* The district court confronted and decided the issue on the merits, treating it as substantial. For reasons unknown to petitioner, however, the issue was ignored in the opinion of the Court of Appeals.

occasions, but was never able to determine White's source. The affiant suspected that the source was petitioner Napoli, and the warrant application artfully weaves in information from a prior suppressed arrest incident, unattributed hearsay, and everything in any way remotely suspicious, in order to convince the magistrate that the DEA focus of suspicion on Napoli was proper. All of White's conversations with Riley (except for the omission in question) are reported in detail, leading to an inevitable conclusion on the part of the magistrate that a deal for LSD had been arranged between Riley and White, that White's source would receive the LSD through the mails, and that a shipment pursuant to the deal was expected shortly. In this artful drafting, only one thing was omitted. Agent Riley admitted that before the warrant was applied for, he had informed the affiant supervisory agent of a conversation subsequent to the last reported in the warrant. In that conversation, White told Riley that he was not going to go through with the

deal, and that the deal was off. The affiant, however, decided not to put that information in the warrant application, giving the magistrate the misleading impression that a shipment of LSD pursuant to an extant deal with White should arrive in New Orleans imminently.

If the last conversation between White and Riley had been reported in the warrant application, any reasonable magistrate could easily have concluded that although cause might have existed at one point to believe that LSD was coming into New Orleans as per the deal, that that cause had ceased when White informed Riley that the deal was off. The magistrate would have had nothing to base his warrant on, except the suggestion in a two days' prior conversation that White and his source "expected a very large quantity for distribution to other customers, as well as Riley." Applying the materiality standard of the securities laws, the warrant would have been declared illegal without hesitation.

Applying either the First or Seventh Circuit standards of intentional misrepresentation, the warrant would have been suppressed. The defense proved that the omission was knowing, relevant, and misrepresentative in its effect. This satisfies the Seventh Circuit standard. Under the more stringent First Circuit standard, if residual probable cause existed after rectifying the omission, then the defense proved that the misrepresentative omission "changed a marginally adequate affidavit into a solidly persuasive one." United States v Belculfine, 508 F.2d at 62. Under the Fifth Circuit standard, however, it is arguable that the defense failed in its burden of proof, because although proving a knowing misrepresentation by omission, it failed to get the affiant to admit that his intent was to deceive the magistrate.

Moreover, if the Fifth Circuit standard of intentional misrepresentation is correct, then a proper respect for Fourth Amendment guarantees

would require that the "but for, no probable cause" materiality standard is incorrect. Knowing misrepresentation -- even without the absolute intent to deceive the magistrate -- is perjury in a sworn affidavit. It robs the magistrate of his constitutional function of assessing probable cause from a full and fair statement of facts, and permits the policeman -- by knowing falsification just short of "but for" materiality and venal deceit -- to assume the mantle of the magistrate. It sanctions a total distortion of the judicial warrant process, and encourages "exactly that quality of unscrupled zeal which impelled the adoption of the exclusionary rule." United States v Belculfine, 508 F.2d at 62. If the intentional misrepresentation standard of the Fifth Circuit is appropriate, then the relevancy standard of the First Circuit should obtain, prohibiting "false statements merely intended to 'round out the picture,'" so that law enforcement officers would not "be placed in the untoward

position of having everything to gain and nothing to lose in strenghtening an otherwise marginal affidavit by letting their intense dedication to duty blur the distinction between fact and fantasy." Id. at 53.

II. This Court Should Grant Certiorari to Determine Whether Historical and Biographical Information Collected by a Federal Drug Agency for its Comprehensive Drug Files Should Be Placed in a Different Category from Fingerprints for Purposes of the Exclusionary Rule, and Further, Whether the Existence of Possibly Independent Sources for Such Information Is Sufficient to Dissipate Taint, When Such Independent Sources Are Used Only to Double-Check Illegally Obtained Historical and Bio-Graphical Information.

Davis v Missisippi, 394 U.S. 721 (1969) dealt with one class of potential evidence taken by law enforcement authorities as a matter of course after an arrest. Specialized agencies, such as the federal Drug Enforcement Administration, have a national computer called NADDIS which makes accessible to the federal agents various kinds of historical and biographical information of an arrestee, enabling them to more

effectively identify suspects in the drug traffic. When the DEA fills out its historical forms after an arrest, as it did with petitioner, it is performing an essentially equivalent task to that undertaken by the obtention of fingerprints on arrest. The historical forms used by DEA differ significantly from an ordinary booking entry, where only name, address, and other limited information about the arrestee is taken. Seeking out the names and addresses of relatives goes well beyond the housekeeping functions satisfied in ordinary booking procedures.

Therefore, since the actions of such agencies are so common, the historical and biographical inquiries form an important part of potential evidence gathering procedures. The Court should declare, one way or the other, whether historical and biographical information obtained on an arrest is to be considered distinct, for Fourth Amendment purposes, from fingerprints.*

* The district court's opinion carves out such information from the purview of the exclusionary rule. Appendix 5A-11A.

The issue is likely to arise, in numerous and unanticipated forms, in a large number of future cases. Illegal arrests, as well as legal arrests, generate this information in DEA and other law enforcement agency files every day.

Moreover, this kind of historical and biographical information is likely to be available from sources independent of an illegal arrest, as is the case with fingerprints. The Court in Davis barred the use in fact of fingerprints obtained after an illegal arrest, although Justice Stewart in dissent argued that fingerprints were "not 'evidence' in the conventional sense" but "[l]ike the color of a man's eyes, his height, or his very physiognomy, the tips of his fingers are an inherent and unchanging characteristic of a man." 394 U.S. 730. Just as unchanging are historical and biographical facts about an arrestee. Yet, the Court rejected Justice Stewart's argument, and rejected the arguments that because such information is readily available

from untainted sources elsewhere, it should be treated differently than other illegally obtained evidence when in fact actually used.

This issue was fully and fairly presented, both in argument, in brief and on the record, in the courts below. Without challenge, the defense proved that the information which tied the address on the package seized at the post office to Napoli -- his mother's address -- was obtained on the occasion of an arrest, found by the state courts to be lacking in probable cause. The information was given by petitioner during an interrogation by DEA agents after the state arrest, in the DEA offices, for the purposes of filling out the DEA historical forms -- for future use by the agency. The testimony of the affiant clearly shows that the telephone and city directories, which apparently had the mother's name and address listed (but not tied to him by other indicia) were merely used to double-check what had already been gleaned from a review of the

historical forms filled out at the time of the illegal arrest. In any sense of the exploitation of taint rule expounded upon by this Court since the rule's inception, the use of the directories was not independent of, but rather come about through, the primary illegality.

Indeed, the decision by the Fifth Circuit here appears to directly conflict with a recent decision of another panel in the Fifth Circuit. In United States v Houltin, 525 F.2d 943 (5th Cir. 1976), the court held the rule on scope of taint to be as follows:

> The "prime purpose of the Fourth Amendment exclusionary rule is "to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable search and seizures" . . . . The essence of that rule is not merely that . . . evidence so acquired shall not be used before the Court but that it shall not be used at all . . . . The determination whether information gained by the police in an illegal search was used to obtain other evidence against the accused is not based on whether the subsequent evidence would not have come to light but for the illegal actions of the police, but rather upon "whether, granting establishment of the primary

> illegality, the evidence to which [the] objection is made has been come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint" . . . .
>
> Evidence should be excluded only where the benefit accruing to society from the additional deterrent against unlawful police practices equals or exceeds the detriment to society caused by the release of criminals. Hence, two exceptions to the exclusionary rule . . . have developed . . . We set out these two exceptions in United States v Castellana, 1974, 488 F.2d 65, 67, rev'd on other grounds, 500 F.2d 325 (en banc); "first, the connection between the lawless conduct of the police and the discovery of the challenged evidence may 'become so attenuated as to dissipate the taint.' . . . . The second means for 'purging the taint' is discovering the same evidence from an 'independent source.' . . . . "
>
> It was established in Nardone [v United States, 308 U.S. 338, 341 (1939)] that the accused has the burden of proving both that the wiretap was unlawfully employed and that a substantial portion of the evidence against him was fruit of that poisonous tree. Theprosecution is then given an opportunity to prove that the subsequently obtained evidence falls within one of the recognized exceptions to the exclusionary rule. . . .
>
> 525 F.2d 947.

On the facts, Houltin and the case at bar cannot be reconciled, except through a reluctance of the cumbersomely large Fifth Circuit to sit en banc to resolve its internal conflicts. The finding of the Court of Appeals is contradicted in the record, and unsupported by any findings of the district court that the telephone directories constituted independent sources. The purge of taint rule is what is at stake.

III. Certiorari Should Be Granted to Stop an Ever Growing Tendency of the Circuits to Permit Searches Beyond the Terms of a Judicially Issued Warrant, and to Resolve Whether or Not the Terms of a Warrant Are Words of Limitation, or Should Be Treated, as the Court of Appeals Thought, in the Common Sense, Layman's Approach to Warrant Applications Mandated by United States v Ventresca.

The warrant in question, signatured by a United States magistrate, directs in terms that the search be limited to the house and structure at 3027 Napoleon Avenue. There was no request in the warrant application, nor authorization in the warrant, for a search of the curtilage or of any

vehicles thereon. Petitioner's camper bus was outfitted as a mobile home, and assumes at least some of the protections that houses enjoy in contradistinction to automobiles.

The Court of Appeals relied on United States v Ventresca, 380 U.S. 102 (1965) as its authority for treating the words of a magistrate in the same way that the words of a layman affiant are treated in evaluating a warrant application. This is clear error, as the function of the magistrate's warrant is to leave nothing to the discretion of the executing officer, but to limit his action after judicial inquiry and sanction of a limited search.

The circuit cases used by the court below as authority for permitting searches beyond the terms of the warrant are likewise incorrect. The tendency of the Fifth Circuit to disregard the fundamental function of the warrant in the Fourth Amendment scheme is illustrated not only by this case, but by its action in United States

v Prout, 526 F.2d 380 (5th Cir. 1976), application for certiorari pending, October Term 1975, No. 75-6701. The Court of Appeals apparently felt a necessity to undermine the warrant requirement because the district court's application of the "automobile exception" was painfully unsupportable on the record:

An agent was stationed at the magistrate's office in the federal courthouse prior to the controlled delivery at 3027 Napoleon Avenue, just fifteen to twenty minutes away. The agent had a radio, and was notified when the package was delivered, so that he could fill in the blanks of an already prepared warrant and have a magistrate sign it. The agent at the magistrate's office notified the agents on the scene by radio on the signing of the warrant, and the search commenced immediately. Radio contact was maintained for some ten to twenty minutes after the warrant was signed. Petitioner was arrested outside of the house, in the driveway near his camper bus.

The bus was outfitted like a mobile home, and locked from the outside with a padlock, with the keys to the padlock having been seized by the agents on petitioner's arrest. There were eight to twelve agents on the scene at all times, with petitioner restrained in handcuffs during the entire period. An automobile blocked free exit from the driveway, and in any case, the camper would have had to have been backed out. There was always at least one armed agent guarding the bus, and preventing civilian entry.

An intensive search of the camper did not begin until about two hours after the arrest. The camper was just under general suspicion during the major part of the search activities as one possible place that the drugs may have been secreted, until all other possibilities had been exhausted by elimination. There was no tip as to where the drugs might be hidden, and the agents had no information that someone was about to leave

in the bus with the drugs.

Given the house-like nature of the camper, its complete immobilization by blockage, padlocking and armed guard, the easy access to an already alerted magistrate minutes away, and the lag in time between the arrest and comprehensive search of the camper, the facts here are even stronger than those in Coolidge v New Hampshire, 403 U.S. 443 (1971) for voiding the warrantless search.

CONCLUSION

WHEREFORE, the application for writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit affirming petitioner's conviction should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have, on this ___day of July, 1976, served three copies each of the foregoing petition on all interested parties by depositing same in a United States mailbox, respectively first class postage prepaid and air mail postage prepaid, addressed as follows:

Hon. Gerald J. Gallinghouse
U. S. Attorney
500 Camp Street
New Orleans, Louisiana 70130

Hon. Robert Bork
Solicitor General
Department of Justice
Washington, D.C.

ROBERT GLASS

* * * * * * *

* APPENDIX *

* * * * * * *

UNITED STATES of America, Plaintiff-Appellee,

v.

Michel Joseph NAPOLI, Defendant-Appellant.

No. 75-1441.

United States Court of Appeals, Fifth Circuit.

April 29, 1976.

Defendant was convicted before the United States District Court for the Eastern District of Louisiana, James A. Comiskey, J., of offenses involving LSD, and he appealed. The Court of Appeals, Godbold, Circuit Judge, held that for purposes of determining sufficiency of affidavit supporting warrant for postoffice search, telephone and city directories, which showed that certain address was that of residence of defendant's mother, were independent sources of such information free of any possible taint, and that reference in subsequently issued search warrant to "on the premises" at certain address, which was described as "large, multiple-story, wooden-frame residential dwelling," was sufficient to embrace camper vehicle parked in driveway on premises almost touching building and authorize search of camper.

Affirmed.

1. Searches and Seizures ⇐3.6(1)

Telephone and city directories, which showed that certain address was that of defendant's mother, were independent sources of such information free of any possible taint and thus postoffice search warrant, affidavit for which alleged that address on package was that of defendant's mother on basis of documents completed at time of defendant's prior arrest on state drug charges, as well as on basis of telephone and city directories, was not tainted by fact that state arrest was allegedly illegal or by failure of affidavit to reveal that state court had suppressed, as illegally seized, evidence on basis of which state arrest had been made.

2. Searches and Seizures ⇐3.6(1)

In search warrants there is no place for technical requirements of elaborate specificity once exacted under common-law pleadings.

3. Searches and Seizures ⇐3.8(2)

Where intent of officers was to seize package and its contents wherever they might be on premises, controlled search for contraband could not be effectively commenced until after it had been removed from mailbox by someone, and ultimate or immediate destination of movable contraband was neither known nor knowable in advance, reference in search warrant to "on the premises" at certain address, which was described as "large, multiple-story, wooden-frame residential dwelling," was sufficient to embrace camper vehicle parked in driveway on premises almost touching building and authorize search of vehicle.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GODBOLD, DYER and MORGAN, Circuit Judges.

GODBOLD, Circuit Judge:

Appellant Napoli was convicted of offenses involving LSD. All issues on appeal relate to the validity of searches.

INDEXED

In April 1974 Drug Enforcement Administration officers obtained a search warrant for a first class package addressed "Michael Joseph, 3027 Napoleon Avenue, New Orleans, Louisiana 70125." (Appellant's full name is Michael Joseph Napoli.) Agents opened the package at the post office and discovered LSD. They removed part of the contents and dusted the inside of the package with fluorescent powder and resealed it.

The officers arranged for a controlled and surveilled postal delivery of the package to the mail box at 3027 Napoleon Avenue. The surveilling officers were in radio communication with an agent waiting in the office of a United States magistrate in New Orleans. The waiting officer was notified by radio from the scene when the package had been placed in the mail box. He completed a previously prepared search warrant application and presented it to the magistrate, who issued a warrant. The warrant recited [brackets are in original]:

> Affidavit having been made before me by Special Agent Raymond Egan Jr. that he [has reason to believe] that [on the premises known as] 3027 Napoleon Avenue, New Orleans, Louisiana, being a large, multiple-story, wooden-frame residential dwelling, in the Eastern District of Louisiana there is now being concealed certain property, namely Lysergic Acid Diethylamide or its derivatives (etc.) . . .
>
> • • • • • •
>
> and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the [premises] above described and that the foregoing grounds for application for issuance of the search warrant exist.

Surveilling officers were notified by radio that the warrant had been issued. Napoli and his girl friend were on the porch at 3027 Napoleon Avenue when the mailman delivered the parcel. The girl was seen to walk toward the mailbox, after which she and Napoli descended the stairs onto Napoleon Avenue and then passed from view, proceeding along the driveway of 3027 Napoleon Avenue and toward the back of the house. After about five minutes officers closed in. As officers approached, Napoli was padlocking the door of a camper bus parked in the driveway. He was arrested outside the door of the vehicle and after he had locked it. The keys to the padlock and traces of fluorescent powder were found on his person. Officers searched the house and yard and, opening the camper with the key, made a brief search of it, all without success. After approximately two hours of searching, the officers, unable to find elsewhere the LSD or the elements of the package in which it had arrived, began taking the camper apart, and in a secret compartment found the LSD.

1. The post office search

[1] The sufficiency of the affidavit supporting the warrant for the post office search is questioned on several grounds, only one of which requires discussion. The affidavit recited that 3027 Napoleon Avenue was the residence of Napoli's mother, a fact which "is recorded in our files by documents completed at the time of NAPOLI'S arrest, above, and in the New Orleans telephone & City directories." Appellant centers upon the reference to "NAPOLI'S arrest, above." Earlier in the affidavit it had been set out that in April 1973 Napoli had been arrested on state drug charges. The fact that Napoli's mother resided at 3027 Napoleon Avenue had surfaced, and

been entered on state court records, when Napoli was booked on the state charges. The affidavit did not reveal, although the affiant knew, that a state court had suppressed as illegally seized the evidence on the basis of which the state arrest had been made, and that subsequently a nolle prosequi of the state charges had been entered. Napoli claims that the booking information was tainted by the allegedly illegal state arrest which in turn tainted the affidavit supporting the post office search warrant, and also that failure of the affiant to reveal what he knew tainted the affidavit and the warrant. These are arguments which it is not necessary for us to discuss. The New Orleans telephone and city directories were independent sources free of any possible taint.

Other contentions concerning the post office search warrant are without merit. The warrant was valid.

2. The search incident to arrest

Napoli concedes that this search is valid if the post office search, which led to the arrest, was valid.

3. Search of the camper

[2, 3] We conclude that the search of the camper was authorized by the warrant. We think that the reference to "on the premises known as 3027 Napoleon Avenue" was sufficient to embrace the vehicle parked in the driveway on those premises. Arguably the language "being in a large, multiple-story, wooden-frame residential dwelling," limits the generality of the preceding language. But in search warrants there is no place for "[t]echnical requirements of elaborate specificity once exacted under common law pleadings." *U. S. v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 746, 13 L.Ed.2d 684, 689 (1965). "It is enough if the description is such that the officer with a search warrant can, with reasonable effort ascertain and identify the place intended." *Steele v. U. S.*, 267 U.S. 498, 503, 45 S.Ct. 414, 416, 69 L.Ed. 757, 760 (1925). There can be little, if any, doubt that the intent of the officers in this instance was to seize the controlled package and its contents wherever they might be on the premises at 3027 Napoleon Avenue, whether when taken from the mailbox they were carried inside the house, retained on the front porch, carried down the steps to the sidewalk, taken to the yard, or removed to an outbuilding or to a vehicle on the premises. The object of the search was movable contraband. A controlled search for it could not effectively be commenced until after it had been removed from the mailbox by someone. The ultimate or immediate destination of the movable contraband, when removed from the mailbox and actually moving, was neither known nor knowable in advance.

In *U. S. v. Anderson*, 485 F.2d 239 (C.A.5, 1973), *cert. denied*, 415 U.S. 958, 94 S.Ct. 1487, 39 L.Ed.2d 573 (1974), a duplex residence with its own grounds was described in a search warrant as 1209 Avenue Q, Apartment B. We held a search of the flower bed outside the house was valid under the warrant. In *Brooks v. U. S.*, 416 F.2d 1044 (C.A.5, 1969), *cert. denied*, 400 U.S. 840, 91 S.Ct. 81, 27 L.Ed.2d 75 (1970), a warrant was issued for the search of the premises known as the lot and cabin of Andy Shaw. A search of both the cabin and of the automobile in which two of the defendants had driven to the cabin turned up many incriminating items. The court upheld the search of the car:

> Search of the automobile was completely justified under the terms of

the search warrant, for which there was probable cause, in that the warrant authorized the search of both the lot and the cabin, and the automobile at the time the search warrant was executed was parked in the lot and very close to the cabin.

416 F.2d at 1050.

See also *U. S. v. Long*, 449 F.2d 288 (C.A.8, 1971), where the warrant described the subject of the search as "the premises commonly known as Tocco Bros. Sea Food Co., 1013–15 North Eighth Street, St. Louis, Missouri, being a one-story red brick structure with a white and grey painted front and a white painted rear, the building being on the west side of Eighth Street between Carr St. and Cole St." A trash barrel outside the building, almost touching the building, was held to be part of the "premises" to be searched. Here the driveway was on the property at 3027 Napoleon Avenue, and the camper was parked on that driveway almost touching the building.

Since we hold that the search of the camper was authorized by the warrant we do not discuss the issue of whether the vehicle could be validly searched without a warrant.

AFFIRMED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

OPINION OF THE TRIAL COURT
DENYING THE MOTION TO SUPPRESS EVIDENCE

(Caption Omitted)

MEMORANDUM OF REASONS

On a prior day the Court issued a Minute Entry denying the defendants' motion and supplemental motion to suppress.[1] The motions to suppress attacked three distinct searches. The first was the April 24, 1974 search of the first class air mail package addressed to Michael Joseph, 3027 Napoleon Avenue. The second is the search of the defendants incident to their arrest after delivery of the package. The third is the search of the camper which was parked in the driveway of the 3027 Napoleon Avenue residence.

The attack on the search of the air mail package is directed to the affidavit in support of the warrant. Defendant Napoli contends that the warrant contains derivatively tainted information from an illegal state search and that the use of aliases does not comply with Spinelli v United States, 393 U.S. 410, 89 S.Ct. 483 (1969) standards. In addition the defendant alleges that the warrant application contained misrepresentations which, if known to the issuing Magistrate, would have destroyed probable cause.

In his first contention the defendant Napoli asserts that his mother's address, 3027 Napoleon, and the aliases recited in the application for the warrant are traceable solely to the state arrest which resulted from an illegal search of his home on Marengo Street in April,

* The government subsequently moved to sever and dismiss the counts against defendant Dubroc. These motions were granted by the Court.

1973. Defendant seeks to apply the "fruit of the poisonous tree" doctrine first forged by the Supreme Court in Silverthorne Lumber Company, et al. v United States, 251 U.S. 385, 40 S.Ct. 182 (1920).

In this allegation the defendant has attempted to convince the Court that historical and biographical information resulting from the administrative processing of an arrestee resulting from an illegal search becomes a fruit of the poisonous tree when such information becomes useful in the procuring of a subsequent warrant for other independent criminal activity.

A brief review of the chronology of the April, 1973 state search and arrest is in order. This information has been gathered from the state court transcript introduced at the hearing on the present motion.

Police officers approached the Marengo Street address with a warrant for the arrest of one Linda Tupin. After knocking on Napoli's door he answered from the second floor that he would be right down. Napoli then walked out on to the porch while shutting and locking the door behind him. Shortly after telling Napoli who and why they were there, Napoli yelled, "Run honey, it's the police." After questioning him a few more minutes and asking him to open the door, the police kicked in the door to search for the girl. Although a warrant was outstanding for the girl, the police did not have a copy of it with them. The Marengo Street house is a three story house. In the course of their search for the girl the police discovered a plastic bag with orange pills in it behind a heater in one of the rooms. The police then arrested Napoli and obtained a search warrant for the house. A further search of the house revealed more drugs of various sorts. Defendant Napoli brought a motion to suppress the

evidence in state court. State Judge Bagert granted the motion but gave no reasons. The District ATtorney's office then nol prossed the charges which were still pending against Napoli. It is unclear from the record just why the state judge suppressed the evidence.

The information which defendant seeks to suppress in the present case does not derive from the search but from the administrative proceeding in which Napoli was booked in the state proceeding. The address 3027 Napoleon was not garnered from the suppressed search but was given by Napoli in the processing procedure. The aliases were recorded by the police on their portion of the arrest record. Napoli's arrest in the state proceeding was never declared illegal by the state court. The actual drugs were suppressed for undisclosed reasons. The historical and biographical information presently at issue was not a product of an illegal search, but of a legal arrest. This court should not now reopen this long closed state proceeding to determine the legality of the arrest.

Defendant in brief and oral argument has placed his greatest reliance on Davis v Mississippi, 394 U.S. 721, 89 S.Ct. 1394 (1969) and United States v Bynum, 262 F.2d 465 (D.C.Cir. 1958). He seeks to analogize the suppression of fingerprints in these cases to the suppression of the historical and biographical information in our case.

In Bynum the defendant telephoned a police station and was told to come there for information on a brother's arrest. Upon arrival he was arrested with no probable cause for robbing, and fingerprinted. Later he was indicted and at his trial for robbery these fingerprints were introduced into evidence and became an important part of the proof when compared to those at the

scene of the robbery. On appeal the fingerprints were ordered suppressed. On a subsequent re-trial Bynum was convicted when other legitimately obtained prints were offered in evidence. However, the knowledge necessary to trigger the use of these prints was traceable only to the prior suppressed prints. In affirming the second conviction the court held:

> "There being no error in the respect which led to our prior decision, above referred to, or otherwise affecting the substantial rights of the appellant, the judgment of conviction is accordingly affirmed." Bynum, 274 F.2d 767 (D.C.Cir. 1960).

The same District of Columbia Court discussed the use of previous knowledge from a prior arrest in Payne v United States, 294 F.2d 723, 726 (D.C.Cir. 1961):

> "He cites our rule in Bynum . . . where we held that fingerprints of the accused taken during a period of illegal detention should be excluded from evidence and indicated that anything of "evidentiary"value produced by such detention should be proscribed. But we later affirmed Bynum's conviction after a second trial at which the prosecutor introduced a fingerprint other than that taken during the period of illegal detention, but which he was able to obtain because he knew Bynum's identity as a result of the fingerprints taken during that period. Implicit in our second holding was a rejection of the sort of "fruit of the poisonous tree" argument advanced in the instant case. Payne, supra, p. 726.

Defendant also urges that the Davis case is controlling. In Davis the defendant's fingerprints were obtained from a police dragnet of suspects. They were first taken on December 3 when the defendant and some 24 other Negro youth were briefly detained for fingerprints. Prints were again taken on December 12 and it was this set which were introduced at trial. Comparison of these prints with those left on a sill at the scene of the rape provided the substantive connection with the crime. Although the Mississippi Supreme Court never declared the December 12 arrest illegal, the state did concede in oral argument before the Supreme Court that this arrest was invalid. The court ordered the prints suppressed.

No similar concession of the illegality of the arrest is present in the case before the court. The significant similarities of Bynum and Davis are not present. In each of these cases the fingerprints were the primary substantive evidence offered to inculpate a defendant in a crime already completed. The exclusionary rule is aimed at suppressing probative evidence of the crime. There is a significant distinction between the derivative fruit that a drug shipment will be made at 3027 Napoleon and the information that defendant's mother lives at 3027 Napoleon. Only the defendant's future independent criminal activity taints this information. This evidence is not probative evidence of past or future criminal activity.

At no time during the hearing did defendant deny that his mother's address was freely given during the booking process. This information was not found in the Marengo house search but was voluntarily surrendered when booked.

In attempting to advance his theory the defendant is actually trying to extend the recognized boundaries of the Fourth Amendment's exclu-

sionary rule. In responding to such a challenge the court must take cognizance of the reasoning behind the court-made exclusionary rule.

The recent Supreme Court decision United States v Calandra, ___ U.S. ___, 94 S.Ct. 613 (1974) presented the question whether a witness summoned to appear before a grand jury could refuse to answer questions on the grounds that they are based on evidence obtained from an unlawful search and seizure. In the course of their opinion the court discussed the purpose and reach of the Fourth Amendment exclusionary rule. Although not factually on point, the court's discourse on the exclusionary rule has helped form this court's insight in reaching its decision:

> "The purpose of the exclusionary rule is not to redress the injruy to the privacy of the search victim . . . Instead the rule's prime purpose is to deter unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable search and seizures:
>
> > "The rule is calculated to prevent, not to repair. Its purpose is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it."

Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most

efficaciously served . . .

> Suppression of the use of illegally seized evidence against the search victim in a criminal trial is thought to be an important method of effectuating the Fourth Amendment. But it does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct.

No meaningful application of the exclusionary rule can be served by the suppression of such biographical and historical evidence in the present case. No pattern of police conduct seeking to obtain and use such evidence against defendants has been shown.

Defendant next contends that the use of aliases in the affidavit in support of the warrant does not meet the criteria of Spinelli v United States, 343 U.S. 410, 89 S.Ct. 584 (1969). Spinelli was an explication of the principles laid down by the court in Aguilar v Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964). In Aguilar a search warrant was suppressed when an examination of the affidavit revealed that the police officer had sworn only that he had "received" reliable information from a credible person and believed "that narcotics" are being stored on the named premises." These two reasons were advanced by the Spinelli court for the Aguilar suppression.

> "First, the application failed to set forth any of the underlying circumstances necessary to judge the validity of the informant's conclusion that the narcotics were where he said they were. Second, the affiant officers did not attempt to support their claim that their information was 'credible' or his information 'reliable'. Spinelli,

supra, p. 587.

Spinelli's affidavit was better prepared since it did contain a report of an independent F.B.I. investigation which is said to corroborate the tip. The court then went on to enunciate two further requirements for crediting tips: (1) the tip must contain a sufficient statmenet of underlying circumstances from which the informer concludes illegal activity present; (2) in the absence of a detailed statement of the manner in which information was gathered, then the tip must describe the accused's criminal activity in sufficient detail that the Magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based on a previously acquired bad reputation. In finding the tip lacking probable cause the court stated further:

> "When we look to the other parts of the application, however, we find nothing alleged which would permit the suspicions engenered (sic) by the informant's report to ripen into a judgment that a crime was probably being committed. As we have already seen, the allegations detailing the FBI's surveillance of Spinelli and its investigation of the telephone company records contain no suggestion of criminal conduct when taken by themselves -- and they are not endowed with an aura of suspicion by virtue of the informer's tip."
> Spinelli, supra, p. 590.

However, the present case is not one covered by the Spinelli-Aguillar tests. The fact of known aliases is not attributed in the search warrant to a tip or an informer. Testimony at the hearing on the motions reveals that Agent Patin had personal knowledge of the aliases. Even if

they are not the personal knowledge, Agent Patin credits it to his fellow officers as well. Furthermore, the warrant affidavit recites facts which, although circumstantial, are additional support for knowledge of the aliases. Agent Patin recited that the utilities at 1640 Marengo Street were in Michel Joseph Napoli's name and had been discontinued with instructions to forward the bill to 1638 Marengo. The phone for 1638 Marengo is listed with a Michael Joseph as resident. This circumstantial evidence coupled with prior personal arrest knowledge which is not suppressible makes the use of aliases proper. In short, this is not a tipster or a mere "reliable informer" situation. Therefore, the Spinelli standards do not apply.

Defendant next contends that a misrepresentation was made in the affidavit to the issuing magistrate. In particular, the defendant contends that the agent's failure to inform the magistrate of the co-defendant White's statement, "The deal is off," is a fatally defective misrepresentation. Defendant contends that had this information been made known to the magistrate the probable cause for issuing the warrant would have been destroyed.

A search warrant may issue only for probable cause which must be determined from the sworn affidavit presented to the judicial officer.

> "Probable cause is deemed to exist where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed."
> United States v Hill, 500 F.2d 315,317 (5th Cir. 1974).

In United States v Thomas, 489 F.2d 664 (5th Cir. 1973) the Fifth Circuit set out the following rule regarding misrepresentations in search warrants:

> "Therefore we hold that affidavits containing misrepresentations are invalid if the error (1) was committed with an intent to deceive the Magistrate, whether or not the error is material to the showing of probable cause; or (2) made non-intentionally, but the erroneous statement is material to the establishment of probable cause for the search. Thomas, supra, p. 669.

In the present case it is not what was said which is attacked but what was not said. Defendant alleges that what was not said misrepresented the true state of affairs and would have destroyed probable cause. The test for probable cause is in determining whether the facts set out in an affidavit present sufficient information of a reliable nature to warrant a prudent man in believing that the defendant has or is(sic) committing a crime.

In the present case the affidavit in question was made from the testimony of an undercover agent who personally dealt with the defendant White. The agent purchased L.S.D. from the defendant. He was personally told by White that it came by mail to his buyer. White was followed to a shop Napoli operated after which he confirmed delivery within two days of April 23. On April 24 Agent Riley was present when a phone conversation between White and his source (Napoli) discussed (sic) delivery. White again confirmed that a delivery occurred to his source thru (sic) the mails and that a very large shipment was due for Riley and other customers. Informants reported LSD present at Napoli's address. On April 25 a

postal watch was initiated which turned up the package in question. An investigation of the return address showed it (sic) non-existent. The package was a size to accomodate a large shipment. Only after the package appeared addressed to a known alias at a known address frequented by Napoli was a warrant applied for. These facts taken in context confirm the delivery referred to by White and constitute probable cause. Under these circumstances as just related the Court finds the failure to state, "The deal is off" as immaterial to the issue of probable cause. Each link of the method and proposed date of delivery were confirmed before applying for the warrant. White's last minute recall of delivery does not destroy probable cause. In addition, the court finds that the alleged omission was unintentional on the part of the affiant. For as the Supreme Court held in Beck v Ohio, 379 U.S. 89, 96, 85 S.Ct. 223, 228 (1964) and has repeatedly affirmed, only probability and not a prima facie showing of criminal activity is the standard of probable cause.

Defendant next attacks his search incident to his arrest. The disposition of this issue necessarily revolves (sic) on that of the validity of the search of the air mail package. Since the court finds the search of the air mail package valid, the probable cause for this search and arrest exists and cannot be tainted.

Defendant's final assertion involves the search of the camper parked in the driveway of 3027 Napoleon. Defendant contends that this search is proscribed by Coolidge v New Hampshire, 403 U.S. 433, 91 S.Ct. 2022 (1971). In Coolidge the police had known for some time the probable role of the car, the defendant had had ample time to destroy the incriminating evidence, the house was guarded at the time of the arrest, and petitioner had no access to the car. In short, no

exigent circumstances for a warrantless automobile search were present.

However, the present case falls under the Chambers-Carroll rationale. Carroll v United States, 267 U.S. 132, 45 S.Ct. 280 (1925) and Chambers v Maroney, 399 U.S. 42, 90 S.Ct. 1975 (1970). Carroll held a search warrant unnecessary when there is probable cause plus exigent circumstances, e.g., the car is moveable, the occupants alerted, and the car's contents may never be found if a warrant is obtained. To this Chambers added the following:

> "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause, either course is reasonable under the Fourth Amendment." Chambers, supra, p. 1981.

Therefore, the only question which the court must answer under the circumstances present in this case is whether probable cause existed. In the present case the agents had no forewarning on the part which the camper would play. The defendants received the package in front of the house in theagent's (sic) view. They then proceeded up the driveway and out of sight. They were arrested shortly thereafter by the camper door. The agents spent hours searching the house. It was only after a fruitless search elsewhere left only the possibility of the camper bus was it searched. At this point the only other alternative was seizure of the camper while a warrant was obtained. There was no question of probable cause since the package was received by the defendants in view of the agents. Flourescent tracings placed on its contents were found on the defen-

dant's person. The agents at the time the search began had no way of knowing the package would ultimately be found inside the camper. Therefore, the court finds probable cause plus exigent circumstances. The only other alternative was for the agents to immobilize the camper while a warrant was obtained.

Accordingly, the defendant's motion and supplemental motion to suppress is hereby, and the same (sic) denied.

/s/ James A. Comiskey
UNITED STATES DISTRICT JUDGE

February 5th 1975